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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROBERT I. NURSE

Appeal 2008-6286
Application 09/755,408
Technology Center 3700

Decided: January 29, 2009

Before DEMETRA J. MILLS, LORA M. GREEN, and
RICHARD M. LEBOVITZ, *Administrative Patent Judges*.

LEBOVITZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of claims 21-27 and 34. Jurisdiction is under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

The claims are directed to a container and reinforcing panel attached to the container. The floor pan of the claimed container is domed.

Claims 21-27 and 34 stand finally rejected by the Examiner as follows:

Claims 21-26 and 34 under 35 U.S.C. § 103(a) as obvious in view of Simmons (U.S. Pat. No. 5,622,276, Apr. 22, 1997) and Syrek (U.S. Pat. No. 5,392,945, Feb. 28, 1995) (Ans. 4); and

Claim 27 under 35 U.S.C. § 103(a) as obvious in view of Simmons, Syrek, and Spykerman (U.S. Pat. No. 6,253,943 B1, Jul. 3, 2001) (Ans. 6).

Claim 21 is the only independent claim on appeal. Claims 21 and 27 are representative of the appealed subject matter and read as follows:

21. A container having a plurality of upstandable sidewalls interconnected by a floor pan, wherein said floor pan is domed, at least one upstanding reinforcing panel releasably connected to at least one of said sidewalls, wherein at least one of said sidewalls is reinforceable with said at least one upstanding reinforceable panel, said reinforceable panel being releasable from said sidewall without separation from said container.

27. A container according to Claim 26 [which is indirectly dependent on claim 21], wherein said reinforceable panel further comprises notches for gripping said reinforceable panel by a user.

OBVIOUSNESS OVER SIMMONS AND SYREK

Claims 21-26 and 34 stand rejected under 35 U.S.C. § 103(a) as obvious in view of Simmons and Syrek (Ans. 4).

Issue

Do Simmons and Syrek suggest a container having a “domed” floor pan as recited in independent claim 21?

Principles of Law

“During [patent] examination, the examiner bears the initial burden of establishing a *prima facie* case of obviousness.” *In re Kumar*, 418 F.3d 1361, 1366 (Fed. Cir. 2005).

To establish obviousness, the following factors must be taken into consideration: (a) the scope and contents of the prior art; (b) the differences between the prior art and the claimed subject matter; (c) the level of skill in the pertinent art; and (d) evidence of secondary considerations. *Graham v. John Deere*, 383 U.S. 1, 17 (1966).

In making an obviousness determination,

[o]ften, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. To facilitate review, this analysis should be made explicit. *See In re Kahn*, 441 F. 3d 977, 988 (CA Fed. 2006) (“[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness”). As our precedents make clear, however, the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.

...

Although common sense directs one to look with care at a patent application that claims as innovation the combination of two known devices according to their established functions, it can be important to identify a reason that would have prompted

a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does.

KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727, 1740-1741 (2007).

Findings of Fact

Scope and content of the prior art

The Simmons patent

1. Simmons describes an apparatus comprising a collapsible container and a liner (Simmons, at col. 1, l. 50 to col. 2, l. 30; col. 2, ll. 59-63).
2. The collapsible container **12** has an impermeable liner **28** with a floor portion and sidewalls **18** and **20** (Simmons, at col. 3, ll. 3-6; Figs. 3-4; *see* Ans. 4).
3. The liner **28** “would be of a flexible plastic-like, fluid impermeable material” (Simmons, at col. 3, ll. 6-7; *see* Ans. 4-5).
4. The liner can be secured to the side walls, as shown in Figure 4, by snap apart members that include an extension member **38** extending from the inner sidewall which engages an inward opening **40** in the liner (Simmons, col. 3, ll. 23-33; *see* Ans. 4).

The Syrek patent

5. Syrek describes a container with a raised dome shaped floor **102** that extends inwardly to form a gutter **112** (Syrek, at col. 3, ll. 25-33; *see* Figs. 3 and 6; *see* Ans. 5).

The Specification

6. The Specification states that the “floor pan 22 [of the container 10] may be domed convex inwardly to increase strength as is known in the art” (Spec. 4:10-11).

Differences between the prior art and the claimed subject matter

7. Simmons describes a liner **28** with sidewalls **18** and **20** and a floor portion (FF1, 2) which meet the limitations of claim 21 of a “container having a plurality of upstandable sidewalls interconnected by a floor pan” (*see* Ans. 4).
8. The collapsible container **12** described by Simmons (FF2) satisfies the limitation of claim **21** of a “reinforcing panel” (*see* Ans. 4).
9. The “reinforcing panel”/collapsible container **12** is attached to at least one of the liner **28** sidewalls by snap apart members (FF4) and is therefore “releasably connected to at least one of said sidewalls” and “releasable from said sidewall without separation from said container” as in claim 21 (*see* Ans. 4).
10. Simmons, however, does not describe its floor pan as “domed” as required by claim 21 (Ans. 5).
11. In sum, Simmons describes all the limitations of the container of claim 21 (FF7-9), but not a floor pan which is domed (*see* Ans. 4-5).
12. Simmons states:

As illustrated, when container **12** is to be placed in the collapsed state as seen in FIG. 2, liner **28** would be disengaged from each of the sidewalls **20** as seen in FIG. 4, with the nipple like extension **38** being disengaged from the ports **40**. At that point, as seen in FIG. 5, both endwalls **18** would be disengaged from their nipple like extensions **38** and endwalls **18** would be folded inwardly in the direction of arrow **47** with liner **28** of sidewalls **20** likewise being disengaged from extensions **38**, and folded inward in the direction of arrows **49**, as seen in FIG. 5, so that the liner of sidewalls **20** is folded onto the floor portion **14**, prior to the endwalls **18** being folded thereupon.

(Simmons, at col. 3, ll. 54-66.)

Level of ordinary skill in the art

13. Persons of ordinary skill in the art knew how to produce a container with a dome shaped floor pan (*see* FF5, 6).

14. Persons of ordinary skill in the art knew that a floor pan which is “domed convex inwardly” would “increase strength” of the container (FF6; *see* Ans. 5¹).

15. As Simmons teaches that its liner is made of “flexible plastic-like . . . material” (FF3), it is considered within the ordinary level of skill to choose the specific flexible material from which to produce the liner.

Reason to modify the prior art

16. Persons of ordinary skill in the art would have had reason to modify the shape of Simmons’ planar floor to be inwardly domed – as in claim 21 – “to increase the load strength of the floor to prevent buckling, deformation or failure” (Ans. 5).

17. “Either with the floor 14 (outer container) being domed or without the floor 14 (outer container) being domed, the . . . flexible material of liner 28^[2] will hold a domed shape with a domed shaped floor 14 (outer container) or with a entirely flat and entirely planar floor 14 (outer container). In this case of a self-supporting liner material, it would not be

¹ “Please note that the domed floor is supported at page 4, lines 10-14 of applicant’s specification wherein it has been stated that ‘the floor pan 22 may be domed convex inwardly to increase strength as is known in the art.’ Such statement is construed as an admission by applicant that the domed floor is prior art.” (emphases removed).

² The Examiner characterized the material as “self-supporting” (Ans. 5), but later admitted that Simmons did not expressly disclose this as characteristic of the flexible material (Ans. 7). We therefore do not rely on Simmons as teaching a “self-supporting” material.

necessary to make the floor 14 (outer container) domed wherein the modification is applied directly to the floor pan (liner)” (Ans. 5-6).

Analysis

The difference between claim 21 and Simmons is that Simmons does not describe a container with a dome shaped floor as required by the claim (FF10-11). The Examiner finds that persons of ordinary skill in the art would have recognized the advantages of a domed shaped floor (FF14) and would have been prompted to add one to the Simmons container to increase its load strength and “prevent buckling, deformation or failure” (FF16, 17).

The Examiner’s reasoning is logical and supported by fact-based findings. We therefore conclude that the Examiner has met the burden of establishing prima facie obviousness of the claimed subject matter. *In re Kumar*, 418 F.3d at 1366.

Appellant argues that “[n]othing in the *Simmons* reference teaches or suggests that the liner 28 is capable of holding a domed shape” (App. Br. 3).

This argument is not persuasive. It was within the level of ordinary skill in the art to construct containers (liner **28**) with dome shaped bottoms (FF13, 14). This would have included selecting flexible materials capable of a holding the claimed dome shape for added strength (*see* FF15).

The Examiner alternatively argued that there was reason to make the container **12** (“reinforcing panel” as in claim 21) domed (Ans. 7-8). In this configuration, the Examiner reasoned that the flexible liner **28** lining the container would conform to a dome shape and therefore meet the claimed limitation (*id.*). Appellant argues that such a structure would be “necessarily more complex than that claimed by Appellant” (Reply Br. 3). We are not persuaded. The Examiner provided a logical reason as to why the ordinary

skilled worker would have made the container **10** floor domed (FF16; Ans. 7-8). Appellant has not identified a flaw in this reasoning other than saying it would result in a structure that is “more complex” than what is claimed. However, the Examiner articulated a reason for making the modification, which Appellant has not rebutted, and the suggested modification meets the claimed limitation. Thus, the legal test of obviousness has been met. Therefore, even were the structure to be more “complex” than necessary, we do not understand how this would undermine the rejection.

Appellant also argues that Simmons’ teaching that the liner wall is “capable of sagging from sidewalls 30” is inconsistent with it being able to retain a dome shape (Reply Br. 3). This argument is not persuasive. Appellant does not point to any support for Simmons’ teaching of a sagging wall. In fact, Simmons shows liner **28** disengaged from the container’s sidewall and “folded inwardly” (FF12). There is no teaching in Simmons that we are aware of that the liner “sags” as Appellant contends it does.

Appellant asserts that Simmons teaches away from adding a dome to the bottom because of the need to modify the container’s “hinge points” and the increase in space necessary for storing the container (App. Br. 3). These arguments are not persuasive.

There is no evidence that the “hinge points” of Simmons’ container would need raising to “further . . . accommodate the dome” or that increased storage space (App. Br. 3) would have dissuaded persons of ordinary skill in the art from adding the dome to the container. Arguments of counsel can not substitute for evidence lacking in the record. *Estee Lauder Inc. v. L’Oreal, S.A.*, 129 F.3d 588, 595 (Fed. Cir. 1997).

Appellant states that the “reasons provided in *Syrek* for providing a domed floor have no applicability to the *Simmons* container” (App. Br. 3).

The Examiner did not rely on *Syrek* for providing a reason to modify *Simmons*. Rather, the Examiner cited an admission in the Specification that a domed shaped floor would have been known to increase floor strength (FF14).

It is stated in the Appeal Brief:

The existence of claimed elements of a combination in the prior art does not, by itself, render the claimed combination obvious. Nothing in the reference teaches or suggests that the floor of the outer shell represents a weakness of the design which would benefit from the addition of a dome, whereas the additional height of the dome would adversely affect the performance of the container with regard to the required storage space.

(App. Br. 4).

It is well-established that precise teachings are unnecessary to establish obviousness. *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. at 1741. As pointed out by the Examiner, a reference is not required, nor expected, to state its weaknesses (Ans. 8). The proper standard for an obviousness determination is whether there is a reason which “would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does.” *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727 at 1741. In this case, the Examiner articulated an express reason for combining *Simmons* with the prior art domed floor: to strengthen it (FF16). The preponderance of evidence in the record supports the Examiner’s findings that persons of ordinary skill in the art recognized the advantages of a domed floor and that such modification was within the level of skill in the pertinent art (FF13-15).

For the foregoing reasons, we affirm the rejection of claim 21.

OBVIOUSNESS IN VIEW OF SIMMONS, SYREK, AND SPYKERMEN

Claim 27 stands rejected under 35 U.S.C. § 103(a) as obvious in view of Simmons, Syrek, and Spykerman (Ans. 6)

The Examiner states that the combination of references describes the subject matter of claim 27, “except for the notches” (*id.*). The Examiner finds that “hand graspable notches 121, 131” are taught by Spykerman and that it would have been obvious “to add the notches to the reinforceable panel [of Simmons] to provide easier grasping of the panel” (Ans. 6-7).

The Examiner provides sound fact-based reasoning for combining Simmons and Syrek with Spykerman. As Appellant does not identify any defect in the Examiner’s reasoning, and we find none, we affirm the rejection of claim 27 for the reasons stated by the Examiner.

CONCLUSION OF LAW

Simmons and Syrek suggest a container having a “domed” floor pan as recited in independent claim 21. We thus affirm the rejection of claim 21. Claims 22-26 and 34 were not argued separately from claim 21. As dependent claims 22-26 and 34 incorporate all the limitations of claim 21, and Appellant does not provide separate reasons for their patentability, we affirm their rejection as well. *See* 37 C.F.R. § 41.37(c)(1)(vii).

We affirm the rejection of claim 27.

TIME PERIOD

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

Ssc:

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